



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-88-12

FACTS:

You recently resigned your position as Executive Director of the Massachusetts Energy Facilities Siting Council (Siting Council) in the Executive Office of Energy Resources (EOER) in order to accept a position as Commissioner of the Department of Public Utilities (DPU). When you were Executive Director of the Siting Council, there were, among other things, three cases pending with that agency. Your past involvement in these matters as well as your potential, prospective involvement as DPU Commissioner is summarized below.

1. DPU Docket No. 86-36

This matter is a generic rulemaking investigation Concerning the electric utility industry. You did not participate^[1] in or have official responsibility^[2] for this matter as Executive Director of the Siting Council. The Secretary of Energy Resources did. Although you generally serve as the Secretary's advisor on many matters, you did not serve as the advisor on this matter. You propose to participate as DPU Commissioner in DPU Docket No. 86- 36.

2. DPU Docket No. 85-178

This matter is a generic rulemaking investigation concerning the gas utility industry. As Executive Director of the Siting Council you gave oral testimony and written comment to the DPU in 1986. An interim order has been issued, but the case is still open to resolve certain remaining issues. You propose to participate as DPU Commissioner in the remaining phases of DPU Docket No. 85-178.

3. DPU Docket No. 87-169

This case is a two-phase investigation of matters pertaining to the state's electric utility companies. You have participated in the first phase of the matter in your position as Executive Director of the Siting Council. You testified as an expert witness in 1987 and 1988, and advised the EOER Secretary and the Attorney General on strategy and policy concerning the matter. You also participated in drafting the briefs submitted by the EOER Secretary and the Attorney General. You do not propose to act as DPU Commissioner on Phase One because an order from DPU on that phase is imminent. You do propose to participate as DPU Commissioner in the remaining phase of the investigation.

QUESTION:

Does your participation as DPU Commissioner in the matters described above comply with the conflict of interest law?

ANSWER:

Yes.

DISCUSSION:

The Commission has addressed a very similar question raised by a former employee of EOER who subsequently became a DPU Commissioner. In EC-COI-82-31, the Commission concluded that As an employee of the EOER and as Commissioner at the DPU you were and are a state employee, G.L. c. 268A, s.1 (q), and are subject to the conflict of interest law. Section 5(a) of that statute prohibits a former state employee from receiving compensation from or acting as agent or attorney for anyone other than the Commonwealth in relation to a particular matter in which the state or a state agency is a party or has a direct and substantial interest and in which he participated while a state employee. The provisions of s.5(a), however, do not apply to a state employee who resigns to accept employment with a second state agency. EC-COI-81-60...

This is also true for s.5(b) restricting activities of the former state employee acting as agency or attorney for a non-state party in relation to matters within his official responsibility. EC-COI-82-31 at 3, fn.3.

We conclude that this same reasoning applies with equal force to your case. The "former state employee" prohibitions articulated in the conflict of interest law do not apply to one who resigns one state job in order to accept another. Our opinion in EC-COI-82-31 was affirmed by the Supreme Judicial Court in Attorney General v. Department of Public Utilities and another, 390 Mass. 208,215(1983) (where the court concluded that, notwithstanding the participation of Commissioner Selgrade in a matter while he was an EOER employee, his further participation in the matter as a DPU Commissioner did not taint the proceedings "with unfairness justifying the reversal of the department's decision"). Accordingly, your proposed participation as a DPU Commissioner in DPU Docket Nos. 87-169, 85- 178 and 83-36 is not prohibited by s.5 of the conflict of interest law.

The "standards of conduct" contained in s.23 of the conflict law apply in addition to all other sections of the law. See, EC-COI- 82-31 (discussing s.23(e) of the conflict law). These provisions were amended in 1986 so that the current parallel section to s.23(e) is s.23(b)(3). The amended s.23 is more flexible than its predecessor; now, in the event of the appearance of a conflict, a public official is not disqualified from participating but rather is required to make a public disclosure. Section 23(b) (3) provides that, absent a public disclosure, a state employee may not act so as to give the reasonable impression that the employee may be improperly influenced, that one can

unduly enjoy the employee's favor or that he or she is likely to act as a result of position or undue influence. G.L. c. 268A, s.23(b) (3).[3] Based on our review of the information which you have supplied concerning the three DPU matters at issue, it appears that a public (i.e., in ~writing and filed with your appointing authority) disclosure would be appropriate before you participate in DPU Docket No. 87-169. This is so because of your active participation in the first phase on the matter (drafting briefs and taking a significant advocacy role). We conclude that the same disclosure is required before you participate in DPU Docket No. 85-178 where an interim order has terminated the phase of the rulemaking investigation in which you had prior limited but official participation. Even your limited Connection with this case could give the appearance of a conflict which would be remedied by disclosure. Because you had no participation or official responsibility for any phase of DPU Docket No. 86-36, there is no requirement of a public disclosure.

You should also be aware that s.23(b) (2) of the conflict law prohibits the knowing or attempted use of your official position to secure for yourself or others unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals. Accordingly, you may not use you DPU position to secure an unwarranted privilege, for example, for an agency with which you have had a prior association. If a public official makes a recommendation or decision which is not based on objective standards, but is rather based entirely on a prior relationship, this may constitute securing an unwarranted privilege for another in violation of s.23 (b) (2).

We must emphasize that, as we did in EC-COI-82-31, the question of the application of common law principles of bias has not been reviewed in this opinion. We are limited to addressing matters strictly within our jurisdiction, i.e., Interpreting and applying G.L. c. 268A and 268B.

DATE AUTHORIZED: May 25, 1988

- Pursuant to G.L. c. 268B, s.3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1] "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, s.1(j).

[2] "Official responsibility." the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, s.1(i).

[3] No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.